

WASHINGTON STATE
OFFICE OF PUBLIC DEFENSE

ANNUAL REPORT

FISCAL YEAR 2001



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ADVISORY COMMITTEE MEMBERS

Honorable Harold D. Clarke, Chair

Mr. Russell M. Aoki

Senator Mary Margaret Haugen

Representative Ruth Kagi

Representative Luke Esser

Senator Jeanine Long

Ms. Mary McQueen

Mr. Andy Pascua

Ms. Catherine Smith

Honorable Philip J. Thompson (ret.)

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MISSION STATEMENT

The mission of Washington State Office of Public Defense (OPD) is to "implement the constitutional guarantee of counsel and to ensure the effective and efficient delivery of indigent appellate services funded by the state of Washington," RCW 2.70.005.

OVERVIEW

Washington State Office of Public Defense is an independent judicial branch agency. Created by the Legislature in 1996, the agency works to enhance the quality of court-appointed counsel and administers funding appropriated for court-appointed counsel in appellate cases. To carry out its joint mandates, Washington State OPD coordinates with the Supreme Court and the three Courts of Appeal, ensures high quality representation through the implementation of procedures for appointment and evaluation of attorney services, initiates legislative proposals and court rule changes, supports the appellate cost recovery system through timely responses to requests, reports and recommends indigency criteria and standards, and provides information and recommendations to the Legislature, including an annual aggravated murder costs prioritized list and special reports as required.

ADVISORY COMMITTEE

The Office of Public Defense Advisory Committee oversees the agency, as prescribed by statute.

The members of the Office of Public Defense Advisory Committee represent a wide spectrum of interests concerned with public defense issues. The Honorable Harold D. Clarke, retired Spokane County Superior Court Judge (appointed by the Chief Justice) chairs the Committee. In Fiscal Year 2001, members of the Advisory Committee were: Honorable Philip J. Thompson, retired Court of Appeals Judge, Division III (appointed by the Court of Appeals); Honorable Mary Margaret Haugen, State Senator from the 10th District (appointed by the Senate); Honorable Jeanine Long, State Senator from the 44th District (appointed by the Senate); Representative Kathy Lambert, State Representative from the 45th District (appointed by the House of Representatives); Representative Ruth Kagi, State Representative from the 32nd District (appointed by the House of Representatives); Mary McQueen, Washington State Court Administrator (appointed by the Chief Justice); Russell M. Aoki, Attorney at Law (appointed by the Chief Justice); Catherine Smith, Attorney at Law (appointed by Washington State Bar Association); Mel Jackson, Millionair Club Charity (appointed by the Governor); and Andy Pascua, Yakima County Department of Community Services (appointed by the Governor).

During Fiscal Year 2001, the Advisory Committee conducted business at quarterly meetings and met additionally as necessary to consider time-sensitive issues. The Advisory Committee reviewed legislative and court rule proposals, established agency policies and procedures, provided oversight of the budget and of agency programs, and resolved fiscal appeals pursuant to court rules.

AGENCY STRUCTURE

A small, efficient staff manages the agency's day-to-day business.

The agency staff is composed of a director, a deputy director, a fiscal analyst, an accountant, an executive assistant, and an administrative assistant. The two financial specialists process invoices for indigent appellate defense services from attorneys, court reporters, county clerks and the appellate courts. They also respond to inquiries related to cost-recoupment, billing procedures and allowable claims. The executive assistant manages office and document preparation matters, and the administrative assistant provides support and technical expertise. The director and deputy director manage the budget and carry out the tasks described below.

AGENCY TASKS AND ACCOMPLISHMENTS IN FY 2001

Washington State OPD efficiently administrated state funds appropriated for indigent appellate representation and other agency operations in FY 2001.

Both the federal and state constitutions and various state statutes guarantee the right to appeal a number of superior court decisions, including criminal convictions, dependency orders, parental rights terminations, criminal contempt convictions, and involuntary civil commitments. Indigent parties involved in these cases, in which their fundamental interests are at risk, are entitled to representation at state expense. In addition to appeals as a matter of right, indigent defendants are entitled to court-appointed representation for responses to state appeals, motions for discretionary review and petitions for review that have been accepted by an appellate court, personal restraint petitions in death penalty cases, and non-death penalty personal restraint petitions that the court has determined are not frivolous.

When an indigent defendant files an appeal as a matter of right, the trial court determines indigency. If the facts warrant an order of indigency, the court appoints an

attorney and authorizes payment of other specified case costs. The parties designate relevant material from the clerk's file and the trial court proceedings for the appellate court to review. The court clerk and court reporter prepare these documents, called the clerk's papers and the verbatim report of proceedings, for use during the appeal by the appellate court and the prosecuting and defense attorneys. In performing publicly funded indigent appellate representations, appointed attorneys review these documents, consult with the client, research the law, prepare and file briefs on the issues and applicable law, and deliver oral arguments in cases if so ordered by the appellate court.

Appellate attorneys, court reporters, county clerks, the Courts of Appeal, and others who have worked on the case file invoices with Washington State OPD. The agency reviews each invoice and authorizes payment for the court-ordered services rendered, based on Washington State Court Rules and rates adopted by the Washington State OPD Advisory Committee. The agency denies payment if reimbursement is not authorized.

During FY 2001 Washington State OPD staff processed 11,757 invoices from court reporters, county clerks, appellate courts (for copies of briefs and transcripts), and attorneys.

During Fiscal Year 2001, \$3,967,832 was disbursed by Washington State OPD for attorney services and \$1,274,678 for other services. Each invoice submitted is verified by reference to the Judicial Information System and the agency's database. Careful auditing of submitted invoices resulted in denials of unauthorized claims totaling over \$90,000 in savings to the state.

In FY 2001, the agency initiated an effective appointment process for death penalty representation in the Supreme Court.

Almost all defendants sentenced to death in capital cases are indigent, and therefore represented by court-appointed attorneys. The Washington State Supreme Court hears all state appellate level death penalty cases. Timely appointment of highly qualified counsel to represent capital defendants is germane to the administration of justice in these cases. Counsel must be experienced and possess specialized capital representation skills. In the spring of 1998, the Supreme Court appointed the Capital Counsel Panel to review the qualifications of applicant death penalty attorneys and create a list of attorneys found to have the requisite skill levels for the three types of state death penalty cases: trials, appeals, and personal restraint petitions. In the fall of 1998, Washington State OPD instituted a new presumptive fee contract method for compensating counsel in appellate level death penalty cases.

In December 2000, in consultation with the Supreme Court Clerk's Office and the Capital Counsel Panel, Washington State OPD implemented a new rotating appointment process for recommending the appointment of death penalty defense counsel for Supreme Court cases. This system provides equitable distribution of available cases among counsel

who appear on the Capital Counsel Panel qualified list. Under the Rotating Appointment Roster, when a new capital appellate case is filed, Washington State OPD contacts list-qualified counsel on an orderly, rotating basis to inquire whether they wish to request appointment by the Supreme Court. Potential counsel are advised as to the presumptive fee set for the case, which has been individually calculated by the agency in consultation with an out-of-state death penalty attorney. The Rotating Appointment Roster procedure allows qualified attorneys to better anticipate the availability of opportunities for appointment in these cases, and ensures that highly qualified list counsel can be timely appointed. During fiscal year 2001 the Rotating Appointment Roster process was used to timely recommend appointed counsel for five appellate level death penalty cases.

Washington State OPD enhanced the existing indigent appellate representation contract system in FY 2001.

Under Washington State Court Rules, the superior trial courts individually appoint counsel for appeals of non-death penalty cases, rather than the Courts of Appeal or another state institution. This has resulted in varying qualities of indigent appellate representation throughout the state. In 1999, Washington State OPD instituted a new contract system in Divisions II and III to implement uniformly high quality defense attorney representation standards in indigent appeals.

Previously, while Division I representation was provided by two competitively selected law firms, Divisions II and III representation was provided by attorneys who had never undergone a formal selection process. As a result of Washington State OPD Requests for Proposals to attorneys in Divisions II and III for appellate indigent contracts, 45 multi-case attorney contracts were entered into for appellate representation, based on evaluations of each attorneys' previous written work, were entered into in 1999 and 2000.

In 2001, in response to a statewide Washington State OPD Request for Proposals for the 2001-2003 biennium in the three Courts of Appeal divisions, 71 attorneys and law firms applied for contracts. Washington State OPD evaluated their applications with the assistance of three panels of expert appellate attorneys, who reviewed multiple briefs written by each applicant, using criteria developed by a law professor. As a result of this process, Washington State OPD entered into contracts at the end of FY 2001 with 45 individual attorneys in Divisions II and III and two law firms in Division I.

To further implement its mandate to provide effective and efficient indigent appellate representation, the agency held a Contractor's Conference on June 30, 2001. As part of the program, the contract attorneys developed criteria appropriate for evaluating the quality of future appellate indigent briefs.

The agency initiated legislative requests and proposed court rule changes in FY 2001.

During the fall of 2000, Washington State OPD proposed three court rule changes to the Supreme Court. These pertained to efficient payment of Courts of Appeal copying costs, clarification of the timing of payment of invoices, and requirements for court reporter invoices. The suggested rule changes were adopted by the Supreme Court in May 2001.

In its 2001 budget request to the Legislature, Washington State OPD sought reasonable increases in attorneys' fees for contract attorneys during the 2001-2003 biennium. The Legislature passed a \$233,000 agency-requested appropriation dedicated to cost of living increases for non-death penalty cases, equaling 3.6% per case. Washington State OPD also requested a 10% increase in the hourly rate paid to capital defense attorneys under presumptive fee contracts in its budget request, and, upon legislative adoption of the agency budget, the Advisory Committee authorized the increase for all indigent appellate capital defense representation contracts.

In May 2001, the Advisory Committee voted to recommend an increase in court reporter compensation by 25¢ per page, in response to a formal request by court reporters. Under court rules, the recommendation requires approval by the Supreme Court.

During FY 2001, Washington State OPD supported the appellate cost recovery system through rapid responses to cost summary requests.

Under the Rules of Appellate Procedure, the appellate court determines the costs taxed to unsuccessful appellants. When an indigent defendant is unsuccessful on appeal, these costs become a part of the legal financial obligations imposed by judgment. The rules require that a cost bill, prepared by the prosecuting attorney, be filed with the appellate court within ten days of the filing of an appellate decision terminating review. Prosecutors' offices forward requests for appellate case cost summaries to Washington State OPD. The agency responds within 24 hours in most cases. In FY 2001, Washington State OPD answered over 650 prosecutors' requests for cost summaries.

The agency recommended criteria and standards for determining and verifying indigency in FY 2001.

In February 2001, Washington State OPD released *Criteria and Standards for Determining and Verifying Indigency*, a report on indigency screening throughout the state. The report

concludes that 1990 legislative criteria for determining indigency, RCW 10.101, has successfully established adequate and consistent guidelines that are being implemented by the trial courts. Areas for improvement were identified, including the mandatory use of standardized forms for determining indigency for appellate cases, the review of indigency decisions in cases where defendants have seasonal employment, and better compliance statewide with a statutory requirement that provisional counsel be appointed at the time of the initial trial court appearance. Washington State OPD staff performed all work for the report, which included two surveys of the courts, telephone and in-person surveys, and extensive research.

Washington State OPD established a pilot program for enhanced representation of parents in dependency and termination cases in FY 2001, in accordance with a legislative directive.

As a result of a 1999 Washington State OPD report entitled “Costs of Defense and Children’s Representation in Dependency and Termination Cases,” the 2000 Legislature directed Washington State OPD to establish an adequate defense representation pilot program during fiscal year 2001. Benton-Franklin counties and Pierce County juvenile courts were selected as sites. Washington State OPD conducted a Request for Proposal process in Benton-Franklin counties in order to contract with two additional attorneys, and contracted with Pierce County Department of Assigned Counsel to add attorneys, paralegals, and social workers to its dependency and termination unit staff. During the year, two pilot trainings were held in order to develop a new model for dependency and termination representation of parents. This representation model emphasizes communication with the parent clients, better preparation of cases, and oversight over the parent clients’ ability to participate in services. The pilot attorneys employed investigative and expert services through appropriated funds made available for that purpose.

As part of the budget proviso language establishing the pilot, the Legislature directed Washington State OPD to contract for independent evaluations both on an interim and final basis. In January 2001 Washington State Office of Public Defense published *Dependency and Termination Defense Pilot Project: Interim Evaluation*. The evaluation found that the pilot attorneys spent most of their time communicating with parents and preparing for cases, and that only 6% of continuances of hearings resulted from pilot attorney overscheduling. The evaluation concluded that the pilot project improved the quality of attorney services for parents, meeting the legislative goals. The pilot program was refunded by the 2001 Legislature.

The agency developed and submitted the 2000 Extraordinary Criminal Justice Costs Act prioritized list.

The Extraordinary Criminal Justice Costs Act, RCW 43.330.190, sets out a procedure by which counties that have experienced high-cost aggravated murder cases may petition for state reimbursement. Under the Act, Washington State OPD annually implements the petition process and submits a prioritized list to the Legislature.

In December 2000, petitions were filed by Cowlitz, Franklin, Klickitat, Skagit, Spokane, Thurston, and Yakima counties. Costs claimed in these were audited and verified, including investigation, prosecution, indigent defense, jury impanelment, expert witnesses, interpreters, incarceration, and other adjudication expenses. The agency created a prioritized list in consultation with Washington Association of Prosecuting Attorneys and Washington Association of Sheriffs and Police Chiefs, and submitted the list to the Legislature, which granted partial reimbursement to all of the petitioning counties for a state total of \$975,000.

CONCLUSION

Washington State OPD continuously seeks ways to improve the quality of its services and more fully meet its joint mandates of implementing the constitutional guarantee of counsel and ensuring the effective and efficient delivery of indigent appellate services. During fiscal year 2001, a new program to improve dependency and termination representation and enhancements to the agency's indigent appellate attorney selection and evaluation processes were implemented. At the same time, agency staff efficiently managed state funds provided for appellate indigent defense and other agency operations and provided appropriate and timely services to the public, court reporters, attorneys, and the courts.

STATISTICAL REPORT

COSTS:

ATTORNEY FEES	
Division I	\$1,653,815
Division II	1,316,024
Division III	671,791
Supreme Court	<u>326,202</u>
TOTAL	\$3,967,832

Table 1: These figures represent the total fees paid to attorneys for constitutionally mandated representation of indigent clients in appellate cases.

COURT REPORTER COSTS	
Division I	\$621,566
Division II	402,380
Division III	178,086
Supreme Court	<u>5,162</u>
TOTAL	\$1,207,194

Table 2: These figures represent the total costs paid to court reporters who have transcribed verbatim reports of proceedings for indigent cases on appeal.

COUNTY CLERK'S PAPERS COSTS	
Division I	\$26,139
Division II	25,147
Division III	16,198
Supreme Court	<u>0</u>
TOTAL	\$67,484

Table 3: These figures represent the total costs reimbursed to county clerks for reproducing designated records for indigent cases on appeal.

BRIEF AND PRO SE TRANSCRIPT COPYING COSTS	
Division I	\$22,469
Division II	23,688
Division III	9,386
Supreme Court	<u>5,017</u>
TOTAL	\$60,560

Table 4: These figures represent the total costs for reproducing briefs for indigent cases on appeal and for indigent pro se transcripts.

STATISTICS:

INVOICES	
Attorneys	5,033
Court Reporters and Pro Se Transcripts	3,259
County Clerks	1,979
Briefs	<u>1,486</u>
TOTAL	11,757

Table 5: Number of invoices processed by Washington State OPD during FY 2001.